NO. 56591-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

(Lewis County Superior
Court No. 19-2-00403-21**)**

SUSAN WOHLLEBEN,
Appellant (Plaintiff)

v.

JOAN JAHNSEN, JAMES JAHNSEN, SR., JORDAN DUNCAN, and CORRINE DUNCAN,
Respondents (Defendants)

APPELLANT SUSAN WOHLLEBEN OPENING BRIEF

Ben D. Cushman
Deschutes Law Group, PLLC
1202 State Ave NE
Olympia, WA 98506
360-464-1055
ben@deschuteslawgroup.com

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1. Introduction and Statement of Facts

This case arises from a boundary dispute in Chehalis, Washington. Appellant's property and Respondents' property are located at the intersection of Pennsylvania Ave and St. Helens Ave, which join at an acute angle. Appellant's property is a triangular parcel defined by the intersection and Respondents' parcel is a rectangular piece just to the north of it.

There is a private driveway/alley along the boundary between the parcels connecting to both Pennsylvania Ave. and St. Helens Ave. This alley is mostly on the Respondents' property, but it meanders onto Appellant's property near the driveway from her property to St. Helens Ave, which also connects to the alley/driveway. These driveways have been in this configuration and connected for many years. (CP 89-92)

Appellant's house was constructed to be accessed both from her driveway (which is steeply sloped) and from the alley/driveway (which is relatively flat). Appellant's kitchen can be accessed over a patio/landing abutting the foundation of her house that connects directly to the alley/driveway in a location

that appears to be intentionally designed for unloading groceries from the alley/driveway. As well as showing historical and designed use of the alley/driveway by Appellant's parcel, this patio/landing extends several inches over the deed described boundary-line. (CP 114-131; CP 456-457; CP 661-665)

Appellant's north yard (along Pennsylvania Ave) is also landscaped. The landscaping, which was installed and maintained by Appellant's predecessor, includes a double arborvitae hedge with two rows of trees along the boundary-line. (CP 458-460) These trees connect to and continue in additional landscaping along Pennsylvania Ave. While the inner row of trees is entirely within the deed-described boundary, the second row of trees is between the deed-described boundary and the edge of the alley/driveway, which is otherwise entirely on Respondents' property at that location. (CP 456-457; CP 458-460; CP 461-488.)

Respondents bought their property after Appellant bought her property and thereafter began to use the alley/driveway for parking (despite having large, dedicated parking areas on their

property and along Pennsylvania Ave, which had been historically used for parking), preventing Appellant from accessing her patio/landing for unloading into her kitchen. Despite the established use and as-built conditions of the access, there was no recorded easement establishing Appellant's right to use the alley/driveway.

There was a recorded easement allowing Respondents to place and maintain the driveway on Appellant's property at the point where it connected to Appellant's sloped driveway from St. Helens. That recorded easement described the easement area with a triangular metes and bounds description. (CP 74-75; CP 612-615) However, the as-built paved area of the alley/driveway extended in a curved shape beyond the edges of the described triangular easement area. (CP 616-617)

When the parties could not agree to terms to continue the historical shared use of the boundary area between the properties, Appellant filed a suit seeking adverse possession of the land where her house and landscaping encroach over the deed-described property line and seeking to establish a legal

right to continue to use the alley/driveway to access the patio/landing for unloading groceries into her kitchen. (CP 3-28.)

In the resulting litigation, the Trial Court dismissed, on motions for summary judgment, both Appellant's claim for prescriptive easement and Appellant's claim for adverse possession. (CP 290-291, CP 575-576) The Trial Court also granted, on summary judgment, Respondents' request to reform the easement by removing the metes and bounds description and replacing it with the as-built paving location, which was located by recent survey. (CP 650-652; CP 616-617) The Trial Court also issued an order enjoining Appellant from using and occupying her property within five feet of the boundary or edge of alley/driveway, which has been reiterated and enforced multiple times. (CP 292-293; CP 714-715; CP 733; CO 811-812) There is no basis in title for any such use restriction.

Further, the granting of the dismissal of Appellant's adverse possession claim and the setback order (which provides a "safe zone" on Appellant's property for Respondents to use

despite of any right in title that they do so) has emboldened Respondents to escalate their acts of trespass along the boundary and, especially, on Appellant's kitchen landing/patio. (CP 661-665)

2. Assignments of Error

2.1 The Court erred in dismissing the Appellant's claim for adverse possession on Summary Judgment when Appellant presented evidence on all elements of a claim of adverse possession.

2.2 The Court erred by granting, on Summary Judgment, Respondents' Request that the Court expand Respondents' easement while also dismissing, on Summary Judgment, Appellants' claim for easement by prescription despite the equivalence of the evidence submitted by the parties on their respective claims.

2.3 The Court erred in restricting Appellants use of her property along the boundary-line despite the absence of any such restriction in title.

2.4 The Court further erred in retaining jurisdiction over this restriction of use, which was in the form of a preliminary injunction, after jurisdiction of this case was transferred to the Court of Appeals.

3. Issues Presented for Review

3.1. Whether the permanent occupancy of land by one of two rows of a double arborvitae hedge that is an integral part

of the claimant's yard landscaping is sufficient evidence to present a triable case for adverse possession of the ground under the trees.

3.2 Whether the permanent occupancy of land by a concrete landing or patio affixed to a house foundation and serving as the entry point to the house is sufficient evidence to present a triable case for adverse possession of the ground under the patio/landing.

3.3 Whether an as-built condition of a road showing a pattern of use is a sufficient basis to reform an easement with a specific metes and bounds description of the easement location to expand the easement to the boundaries of the historic use when there is no other evidence of mistake or scrivener's error in the creation of the easement.

3.4 Whether, if historic use is sufficient to expand an express easement, exactly comparable historical use, supported by circumstantial evidence from the as-built condition of a patio/landing and connecting driveway on one property presents

a triable case for an easement by prescription on and over the neighboring property.

3.5 Whether the Court had authority to enjoin a party from the lawful use and occupancy of her property along the boundary and the edge of an easement beyond the limits of any easement of record.

3.6 Whether the Trial Court has continuing jurisdiction over a preliminary injunction, never made permanent in any judgment, final ruling, or permanent injunction of the Trial Court, after appeal of the case.

3.7 Whether, if the preliminary injunction is an implied and permanent part of Final Order issued in this case, enforcement of that injunction was stayed by operation of the Supersedeas Bond posted to stay enforcement of that Final Order.

3.8 Whether Fees were properly awarded, prior to trial, when Respondent's claims for adverse possession and prescriptive easement were properly triable and not frivolous.

4. Statement of the Case and Summary of Argument

The overarching error in this case appears to be that the Trial Judge engaged in a weighing of the evidence on summary judgment that is not appropriate for the summary judgment process. Respondents filed multiple motions for summary judgment and were granted dismissals or affirmative relief on all such motions. In each case, the Trial Court appears to have considered and weighed the evidence in support of the motion against the evidence submitted in opposition and determined that the weight of the evidence favored granting the motion. That is error.

The Respondents are a multi-generational family of teachers with old ties to the Chehalis community represented by a former state representative with even deeper connections. Appellant is a newcomer to town who bought her house from a probate estate based on representations made about the ease of access. (CP 114-131) With this context, it is not surprising that Respondents presented far more declarations in support of their motion than Appellant could present in opposition. Other than

factually ambivalent deposition testimony, Appellant's evidence was mostly circumstantial, although she did present historical use testimony from her predecessor's longtime landscaper. (CP 458-460)

Respondents' evidence presented on summary judgment, at least in a document count and number of pages, outweighed Appellant's evidence, and the Trial Court took that as dispositive. However, that kind of weighing of evidence is inappropriate on summary judgment. If weighing of evidence is necessary to resolve an issue, the case must proceed to trial where such weighing of evidence is appropriate. On summary judgment, the moving party's evidence is only appropriately considered as placing claims in issue. Thereafter, the non-moving party's evidence should be considered on its own merits, rather than in comparison to that presented by the moving party, and if the non-moving party's evidence would be sufficient to support a judgment in their favor if it were the only evidence presented at trial, then summary judgment must be denied, and the case must proceed to trial.

In this case, there is evidence of adverse use and occupancy of Respondents' land to support a judgment in favor of the Appellant on both her prescriptive easement claim and her adverse possession claim. Therefore, trial of these claims would not be useless. The Trial Court also erred in its affirmative orders expanding the Respondents' easement beyond its metes and bounds description and imposing additional restrictions on Appellant's use and occupancy of her property beyond any restriction in title. This Court should reverse and remand this case for trial of all the claim either granted or dismissed on summary judgment.

5. Argument

5.1 Standard for Review.

The primary appeal is a review of orders granting summary judgment and other summary relief to the Respondents early in the case. Summary judgment is only proper if there are no genuine issues as to any material facts and the moving party is entitled to judgment as a matter of law. CR 56(c); *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846

(2007). Facts and reasonable inferences therefrom are viewed most favorably to the nonmoving party. *Bostain*, 159 Wn.2d at 708. And summary judgment is only proper if reasonable minds could reach only one conclusion from the evidence presented. *Id*.

When reviewing an order of summary judgment, the Court of Appeals engages in the same inquiry as the Trial Court, affirming the order only if there are no genuine issues of material fact and only if, on the undisputed facts, the moving party is entitled to judgment as a matter of law. *Failor's Pharmacy v. DSHS*, 1 25 Wn.2d 488, 493, 886 P.2d 147 (1994).

On review "adverse possession is a mixed question of law and fact. Whether essential facts exist is for the trier of fact to determine; whether the facts, as found, constitute adverse possession, if for the court to determine as a matter of law." *Crites v. Koch,* 49 Wn. App. 171 at 174, 741 P.2d 1005 (1987).

The standard of review of equitable remedies and injunctions is abuse of discretion. *Steury* v. *Johnson,* 90 Wn. App. 401, 405, 957 P.2d 772 (1998) ("a suit for an injunction is

an equitably proceedings addressed to the sound discretion of the trial court, to be exercised according to the circumstances of each case."); *Friend* v. *Friend,* 92 Wash.App. 799, 803, 964 P.2d 1219 (1998) (standard of review of a trial court's partitioning of property is abuse of discretion); *City of Bremerton* v. *Sesko,* 100 Wn. App 158, 162, 995 P.2d 1257 (2000); *Northwest Properties Brokers Network, Inc.* v. *Early Dawn Estates,* 173 Wash. App 778, 789, 305 P.3d 240 (2013) (a trial court's decision to grant an injunction and terms of that injunction are reviewed for an abuse of discretion).

Here, Appellant presented evidence which, if believed by the jury despite contrary evidence presented by Respondents, appropriately supports a judgment in her favor for adverse possession. Similarly, the evidence the Court accepted when it reformed the Respondents' easement by expanding it further onto the Wohlleben property is no different from the evidence the Court rejected when denying Appellant an easement by prescription over the same alley/driveway. Therefore, the evidence should either have resulted in a denial of the summary

judgment granted to the Respondents or should have allowed Appellant to proceed to trial on her prescriptive easement claim.

5.2 Law of Adverse Possession.

To establish a claim of adverse possession "the claimant must prove his possession was actual and uninterrupted, open and notorious, hostile and exclusive for more than 10 years." *Draszt* v. *Naccarato,* 146 Wn. App. 536, 542, 192 P.3d 921 (citing *ITT Rayonier, Inc.* v. *Bell,* 112 Wn.2d 754, 757, 774 P.2d 6 (1989). "The construction and maintenance of a structure partially on the land of another almost necessarily is exclusive, actual and uninterrupted, open and notorious, hostile and made under a claim of right." *Draszt* v. *Naccarato,* 146 Wn. App. 536, 542, 192 P.3d 921, 924 (2008) (citing with approval *Reitz* v. *Knight,* 62 Wn. App. 575, 582, 814 P.2d 1212); see also *Erickson* v. *Murlin,* 39 Wash. 43, 45, 80 P. 853 (1905).

A mistake of fact by adjoining landowners regarding the true location of a boundary line "does not prevent such possession and claim of ownership ripening into title by adverse possession." *Beck* v. *Loveland, 37* Wn.2d 249, 257, 222 P.2d 1066 (1950),

overturned on other grounds by *Chaplin v. Sanders,* 100 Wn.2d 853, 676 P.2d 431 (1984). In *Beck,* the Court held "though the fence may have been established originally by mistake [about where the property line is located], if it were followed by a claim to the land, and such acts as clearly evinced a determination of permanent proprietorship, the [adverse possession] claim is established." *Beck* v. *Loveland,* 37 Wn.2d at 256.

The element of hostility requires a claimant "treat the land as his own as against the world throughout the statutory period." *ITT Rayonier, Inc. v. Bell,* 112 Wn.2d 754, 761, 774 P.2d 6 (1989) (citing *Chaplin v. Sanders,* 100 Wn.2d 853, 860-62, 676 P.2d 431 (1984)). Hostility does not require or imply enmity or ill-will. "[I]t connotes rather that the claimant's use has been hostile to the title owner's, in that the claimant's use has been that of an owner." *Miller v. Anderson,* 91 Wn. App. 822, 828, 964 P.2d 365, 369 (1998). In adverse possession claims, the term "hostile" and "adverse" are used interchangeably by courts. 17 Wash. Prac., Real Estate § 8.12 (2d ed.).

It is true that permission from the true title owner to occupy the land negates hostility. *ITT Rayonier, Inc. v. Bell,* 112 Wn.2d 754, 761, 774 P.2d 6 (1989) (citing *Chaplin v. Sanders,* 100 Wn.2d 853, 860-62, 676 P.2d 431 (1984)). ("Permission can be express or implied; an inference of permissive use arises when it is reasonable to assume 'that the use was permitted by sufferance and acquiescence. ",); see also, *Northwest Cities Gas Co.* v. *Western Fuel Co.,* 13 Wn.2d 75,85, 123 P.2d 771 (1942) However, "[w]hether use is adverse or permissive is a question of fact." .*Miller* v. *Anderson,* 91 Wn. App. 822, 828,964 P.2d 365 (1998). Therefore, the permission defense to adversity in the adverse possession context is not appropriately resolved on summary judgment if there is any evidence, circumstantial or otherwise, that the use was not permissive.

The *Drastz* case, which affirmed the presumption of adversity in *Northwest Cities Gas*., is particularly informative. *Draszt* v. *Naccarato,* 146 Wn. App. at 542, 192 P.3d at 924 (citing with approval *Reitz* v. *Knight,* 62 Wn. App. 575,582,814 P.2d 1212); see also *Erickson* v. *Murlin,* 39 Wash. 43, 45, 80 P.

853 (1905). In *Draszt,* the plaintiff, owner of a cafe, and defendant, owner of a market, shared a lot that had been divided in two with the intention that the market building would form the boundary line. *Draszt* 146 Wn. App. at 539, 192 P.3d 921. The parties' predecessors in interest divided the lot in 1986 by quitclaim deeds with the intention that the market building would on the boundary line. *Id.* Unbeknownst to anyone, when the market building and its fence were built, it encroached onto the cafe's half of the property by 12 feet. *Id.* The parties made a mistake of fact regarding the actual boundary line. The encroaching building existed prior to 1947 and the fence prior to *1986. /d.* at 542. The defendant (market owner) possessed the disputed strip of land for almost 20 years. *Id.* The appellate court affirmed the lower court's ruling that the defendant (market owner) had acquired the land by adverse possession because "the construction and maintenance of a structure partially on the land of another almost necessarily is exclusive, actual and uninterrupted, open and notorious, hostile and made under a

claim of right." *Draszt,* 146 Wn. App. at 542 (citing *Reitz v. Knight, 62* Wn. App. 575,582,814 P.2d 1212 (1991).

Appellant's use of the land under her patio and behind and under her arborvitae hedge was also "exclusive" under the law of adverse possession. The requirement that an adverse possessors' use be exclusive requires no more than use of the land as a true owner would use it. In order to prevail on an adverse possession claim "the claimant's possession need not be absolutely exclusive. Rather, the possession must be of a type that would be expected of an owner under the circumstances." *Crites* v. *Koch,* 49 Wn. App. 171, 174,741 P.2d 1005. The "nature and location of the land" are important in determining how a true owner would use the land. *ld.* at 174. "Trifling encroachments by an owner on land held adversely does not render the claimant's use nonexclusive." *ld.* at 175. (emphasis added)

In *Crites,* it was undisputed that the plaintiff had continuously "planted, harvested, rotated, and sold crops in the same manner" as his adjoining land for at least 15 years. *ld.* at

174. The defendant's use of the same property "never interfered with the appellants' use" of the farm and was "very, very slight." *ld.* at 175. The *Crites* court therefore concluded that plaintiff s use of the land satisfied the exclusive element. *ld.*

Similarly, actual and uninterrupted use need not be absolute, but rather must be a use of the land as a true owner would use it. *Chaplin* v. *Sanders,* 100 Wn.2d 853, 857, 676 P.2d 431 (1984). A claimant's possession and use must only be "like that of a true land owner, considering the land's nature and location." *Acord* v. *Pettit*, 174 Wn. App. 95,104,302 P.3d 1265 (citing *Chaplin,* 100 Wn.2d at 861). That is, "[w]hat constitutes possession or occupancy of property for purposes of adverse possession, necessarily depends to a great extent upon the nature, character, and locality of the property involved and the uses to which it is ordinarily adapted or applied." *Frolund* v. *Frankland,* 71 Wn.2d 812, 817, 431 P.2d 188 (1967), *overruled on other grounds by Chaplin,* 100 Wn.2d 853 (1984). "Exclusive dominion over land is the essence of possession, and it can exist in unused land if others have been excluded therefrom." *Wood* v.

Nelson, 57 Wn.2d 539, 540, 358 P.2d 312 (1961). The purpose of requiring use and possession is "to convey to the absent owner reasonable notice that a claim is made in hostility to his title." *Malnati v. Ramstead,* 50 Wn.2d 105, 109, 309 P.2d 754 (1957). "Evidence of *use* is admissible because it is ordinarily an indication of *possession.* It is *possession* that is the ultimate fact to be ascertained." *Wood,* 57 Wn.2d at 540 (emphasis added). Still, "neither actual occupation, cultivation or residence are [sic] necessary to constitute actual possession." *Campbell v. Reed,* 134 Wn. App. 349, 362-63, 139 P.3d 419 (2006) (citing *Bellingham Bay Land Co.* v. *Dibble,* 4 Wash. 764, 770, 31 P. 30 (1892). "If a line of use is obvious upon the ground to prudent observation," adverse possession may exist up to a reasonable projection of that line." *Campbell,* 134 Wn. App. at 363 (citing *Frolund,* 71 Wn.2d at 820).

In *Campbell v. Reed,* plaintiff brought an action to quiet title based on adverse possession, among other legal theories. 134 Wn. App. at 354. The land which plaintiff claimed was not permanently occupied and there was evidence the land was

without boundary markers except for a "dilapidated barb wire fence." *Id.* at 355-56. Other evidence showed plaintiff "constructed a road, cleared brush, cut firewood, all of which left a mark on the property." *ld.* at 361. There was also evidence that the clearing of brush made the property "distinctly different than the adjoining property." *ld.* at 362.

The court in *Campbell* found the presence of a fence and other activity was "sufficient evidence to create material issues of fact" about whether the land was actually possessed. *Id.* at 363. The court therefore found summary judgment in favor of defendant was not proper and remanded the case to the trial court. *Id.* at 364.

A claimant must show possession of the disputed land was open and notorious. *Chaplin,* 100 Wn.2d at, 857,676 P.2d 431. The element is satisfied if the owner has "actual knowledge of the possession." *Id.* at 862. Like other elements, the character of the land must be considered when determining if the facts of use and possession are sufficiently open to give the land-owner notice of a claim to the land. *Id.* at 863. "If the owner knew of

the adverse user, no further proof as to notice is required." *Hovil* v. *Bartek,* 48 Wn.2d 238, 242,292 P.2d 877 (1956).

In *Draszt,* supra, the appellate court affirmed a finding of adverse possession and explained "the construction and maintenance of a structure partially on the land of another almost necessarily is *exclusive,* actual and uninterrupted, open and notorious, hostile and made under a claim of right." *ld.* at 542. As seen below, same logic and analysis applies in this case and the Wohlleben adverse possession claim should have proceeded to trial.

5.3 Application of Law of Adverse Possession to Facts and Evidence and Superior Court Error.

The Wohlleben property has two features that encroach over the property line. First, the landscaping in her front yard includes, along the boundary, a double rowed hedge of arborvitae trees. The row closest to the Respondent's property encroaches over the line. However, this double-row hedge is an obvious and integral feature of the Wohlleben landscaping, and the two rows are part of a single, unified landscape feature. It

also serves, as hedges do, as a fence, excluding entry onto the Wohlleben property beyond the hedge. Therefore, the hedge is an actual, open, notorious, continuous, and exclusive occupancy of land within the Respondents' titled area, hostile and adverse to the Respondents' use and ownership of the strip of land under the hedgerow. Appellant Wohlleben has a triable, even a strong, case for adverse possession to that portion of the boundary, and this case should have gone to trial.

Second, Wohlleben has an even stronger case for adverse possession to a portion of the Respondents' land just behind her kitchen. That land is located under and is permanently occupied by a landing/patio attached to the foundation of her house. That landing/patio acts as part of her house and serves as an entrance area to it from her yard and from the alley/driveway at issue in the prescriptive easement claim. There is no other use that this landing/patio can serve. Specifically, it has no use to the Respondents except as a location where they, as visitors to Appellant's home, can knock and be greeted. Therefore, the

only possible use of that landing/patio is that of Appellant, who uses it as part of her house.

5.4 Law of Easements.

Easements can be established either expressly, by grant of the subservient estate, or through legal implication or prescription. Both bases of an easement are at issue here. There is an express easement granted to Respondents for ingress and egress over a portion of Appellants' property where an alley/driveway meanders along the property boundary. Similarly, and from the same general time as that grant, Appellant has used the alley for access to her property, as did her predecessor, and her house has a landing near her kitchen specifically designed and built for that use.

To establish a prescriptive easement, a claimant must prove: (1) use adverse to the title owner; (2) open, notorious, continuous, and uninterrupted use for 10 years; and (3) that the owner knew of the adverse use when he was able to enforce his rights. *Lee v. Lazier*, 88 Wn. App. 176, 945 P.2d 214 (1997). For purposes of establishing the adversity element of a

prescriptive easement (as with adverse possession), intent of the party claiming the easement is irrelevant and the observable acts of the user govern. *Dunbar v. Heinrich*, 95 Wn.2d 20 at 27, 622 P.2d 812 (1980). The reverse is not true, and the intent of an owner granting use of their land is relevant. As the court noted in *Lee v. Lozier*:

> [C]laimants who were granted permission to use land ... are not automatically precluded from claiming that they are entitled to a prescriptive easement. The important question is whether the landowner permitted the use as a mere revocable license or whether an oral grant of a permanent right to use the property was intended.

Lee at 182 (citations omitted).

However, Washington courts have determined that an easement cannot be relocated without the consent of all interested parties. *MacMeekin v. Low Income Housing Institute, Inc*., 111 Wn. App. 188, 199, 45 P. 3d 570 (2002); *Crisp v. VanLaeken*, 130 Wn. App. 320, 122 P. 3d 926 (2005); see also *Coast Storage Co. v. Schwartz*, 55 Wn.2d 848, 854, 351 P. 2d 520 (1960) ("We agree with the defendants that the consent of all interested parties is prerequisite to the relocation of an

easement."). In *MacMeekin*, the Court of Appeals examined whether the court could relocate an easement implied by prior use. *MacMeekin* at 199. The Court observed that "[t]he majority of courts that have addressed the issue have held that they lack the equitable authority to order relocation of an easement, even if the change is necessary to one estate and would not inconvenience the other." *Id.* Accordingly, the Court concluded that an easement, however created, is a property right, and as such is not subject to relocation absent the consent of both parties. *MacMeekin* at 207. Specifically, the *MacMeekin* court expressed approval with out of state authority which holds courts "lack the equitable authority to order relocation of an easement." *MacMeekin*, 111 Wn. App. at 207.

The reasoning of the *MacMeekin* court was confirmed in the subsequent case of *Crisp v. VanLaeken*, 130 Wn. App. 320, 122 P. 3d 926 (2005). There, the Crisps sought to sell property to a third party for development. *Crisp*, 130 Wn. App. at 322. After the neighboring VanLaeken's refused to modify the location of an easement needed for development, the Crisps

"filed an action seeking a court order relocating the easement." Id. Relying on *MacMeekin*, 111 Wn. App. at 190, the Court rejected overtures to adopt the minority view" to allow modification by the servient estate owner. *Id.* at 324- 25. Adopting the analysis of the *MacMeekin* court, the *Crisp* court reiterated the " traditional approach," followed in Washington, which favors " uniformity, stability, predictability and property rights." *Id*. at 325, quoting *MacMeekin*, 111 Wn. App. at 205). Accordingly, the *Crisp* court rejected invitation to judicially modify the existing easement:

> Here, the warranty deed unambiguously created an easement burdening lot 67. The Crisps argue only that they want to build a home on their lot and, therefore, this court should grant them the right to relocate the VanLaekens' easement. We decline to do so.
>
> Judicial relocation of established easements, such as the one at issue here, would introduce uncertainty in real estate transactions. The Restatement's version of the relevant rule could invite endless litigation between property owners as to whether a servient estate owner may relocate an existing easement without a dominant estate owner's consent.

Crisp at 325- 26.

However, the equitable power of the Court does extend to reformation of conveyances as deeds, within strict limits, clearly appropriate circumstances, and after clear and compelling proof. *Wilhelm v. Beyersdorf*, 100 Wn. App. 836, 999 P. 2d 54, the Court held it is proper to reform a legal document granting an easement, to the extent it is deficient, provided the document was clearly intended to accomplish a certain objective and the document did not and could not execute that intention as drafted. Further, such reformation is appropriate only “if there is clear, cogent and convincing evidence of a mutual mistake or a unilateral mistake *coupled with inequitable conduct*." (*Id*. at 843, emphasis added) or clear scrivener' s error (*Id*. at 843- 844).

The touchstone of the *MacMeekin/Crisp* analysis is to preserve "uniformity, stability, predictability and property rights." *Crisp*, 130 Wn. App. at 325. Any exercise of equity over property, including equitable reformation, must be done subject to the over-arching goal of preserving predictability and stability of property rights and deeds and preventing the "endless litigation" contemplated by the *Crisp* court at 325. Similarly,

the key to any exercise of equitable powers of the Court is that they be exercised equitably – putting each party on the same footing such that if a basis for title is found to exist on presented facts for one of them, if the other party presents comparable or parallel facts, that party should be given the same equitable result. Uneven application of equity, as here, is not only inequitable, it also undermines the predictability and stability of property rights.

5.5 Application of Law of Easements to Facts and Evidence and Superior Court Error.

Unlike adverse possession, which was a claim made only by Appellant, there were cross-claims for equitable recognition of easement rights beyond those established in title. The title history of these properties includes an ingress/egress easement benefiting Respondents' property located on triangular area of Appellant's property specifically described by metes and bounds in a recorded easement document. Neither party disputes the existence of that easement in that location.

However, the alley/driveway at issue in the easement cross-claims extends outside the described easement area. Based on the circumstantial evidence of its as-built condition, the Respondents asserted and were granted, without trial, reformation of the easement to expand it beyond the limits of its metes and bounds description to the edge of the as-built paving of the road. (The Respondents were granted further relief, not supported by any easement description or circumstantial evidence, of a five-foot use setback from the edge of the reformed easement and/or boundary-line, creating a strip of her property that Appellant could not use lest that use interfere with any trespass by Respondents along the boundary or easement area.)

However, despite having similarly compelling circumstantial evidence of adverse use of the alley/driveway based on as-built conditions of her property (the landing, which encroaches into and is accessed from the alley/driveway and her own driveway, which attaches to it), Appellant was denied trial on her prescriptive easement claim.

There is no legal difference between these claims justifying this disparate resolution of them. Both claims assert easement rights beyond those in title. In both cases, the claim was for equitable easement rights not found in the legal rights established by title. The equitable principle for both claims is the same. Therefore, the equitable analysis and rule for admission and acceptance of evidence for both claims should be the same. Either Appellant should have been granted a prescriptive easement or Respondents request to expand their easement by reformation should have been denied.

5.6 Over-Reaching Preliminary Injunction Restricting Use of Plaintiff's Property

The imposition of a judicially-created five-foot "no use or occupancy" setback not supported by any restriction in title was a particularly egregious equitable over-reach by the Trial Court. The evidence presented in support of this request was the Respondents feared that they might be scratched by briars cut during Appellant's landscaping work and placed, prior to disposal, inside Appellant's property. (CP 222-228) Any such

scratching would be possible only if Respondents had trespassed over the property line onto the Wohlleben property.

In Washington, an owner or occupier of land owes no duty to a trespasser except to refrain from willfully or wantonly injuring the trespasser. *Johnson v. Schafer*, 110 Wn.2d 546, 756 P.2d 134 (1988); *Ochampaugh v. City of Seattle*, 91 Wn.2d 514, 588 P.2d 1351 (1979); *Winter v. Mackner*, 68 Wn.2d 943, 945, 416 P.2d 453, 454 (1966); *Zuniga v. Pay Less Drug Stores, N.W.*, 82 Wn. App. 12, 917 P.2d 584 (1996). However, in *Laudermilk v. Carpenter*, 78 Wn.2d 92, 457 P.2d 1004 (1969), the Court held that the duty owed to small children by an owner or occupier of land is a duty of reasonable care, even though the child may technically be a trespasser. Reasonable care does not extend to a duty to refrain from any use of occupancy of land. Therefore, the Court's ruling was an over-reach and an error, imposing duties to trespassers unsupported by law.

5.7 Improper Continuing Enforcement of Preliminary Injunction by Superior Court after Appeal

In hearing (although properly denying) a Motion for Contempt for alleged violations of over-reaching setback order, the Trial Court erred in ruling that it had continuing jurisdiction over the order. The Order was, on its own terms, a preliminary injunction rather than a judgment or final decision of the Court. RAP 7.2(a) limits the continuing jurisdiction of the Trial Court to matters expressly authorized by RAP 7.2. Nothing in RAP 7.2 allows the Court to have continuing jurisdiction to enforce preliminary orders made in the process prior to trial but never elevated to a final order or judgment.

RAP 7.2(c) allows the Court to enforce judgment and final decisions, through supplemental proceedings or similar, post-judgment process, but that authority is predicated on their being a judgment or final order to enforce. In the case of injunctive relief, preliminary injunctive relief does not provide continuing trial court authority, while authority is maintained to enforce a permanent injunction entered after trial (which

substitutes for and replaces any preliminary injunction on the same subject), or any injunctive relief incorporated into a final judgment. In this case, there is no final decision or judgment permanently extending the setback order.

Further, the only enduring, judgment-like order of the Court is its rulings on fees and reformation of the easement, and this judgment has been stayed by Plaintiff's posting of a supersedeas bond. (CP 653-655) Therefore, even if there were some final judgment to enforce, any such enforcement has been stayed pending appeal and the Court's exercise of jurisdiction over its preliminary set-back order, notwithstanding its appropriate resolution of that request, was *ultra vires*.

5.8 Award of Attorney's Fees

The general rule in Washington, commonly referred to as the "American rule," is that each party in a civil action will pay its own attorney fees and costs. *Cosmopolitan Eng'g Grp., Inc. v. Ondeo Degremont, Inc*., 159 Wn.2d 292, 296, 149 P.3d 666 (2006). Trial courts may award attorney fees only when

authorized "by contract, statute, or a recognized ground in equity.'" *Cosmopolitan* at 297.

An award of attorney fees is an issue of law the Court of Appeals reviews de novo. *Bloor v. Fritz*, 143 Wn. App. 718, 747, 180 P.3d 805 (2008). While the reasonableness of an attorney fees award is a matter of discretion, such an award should be reversed if it is unreasonable or untenable (*Allard v. First Interstate Bank of Washington*, 112 Wn.2d 145, 148-49, 768 P.2d 998 (1989)) or insufficiently supported (*Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 690, 82 P.3d 1199 (2004)).

A fee award must be based on an analysis called "the lodestar method" and that analysis must be apparent in the record. *Mahler v. Szucs*, 135 Wn.2d 398, 433-434, 957 P.2d 632 (1998); *Berryman v. Metcalf*, 177 Wn. App. 644, 660, 312 P.3d 745 (2013). Under the lodestar method, the fee is calculated by multiplying the reasonable hourly rate by the reasonable number of hours expended on the matter. *Svendsen v. Stock*, 143 Wn.2d 546, 559, 23 P.3d 455 (2001); *Scott Fetzer Co. v. Weeks*, 122

Wn.2d 141 at 149-50. The number of hours reasonably expended does not include hours spent on "unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time." *Mahler*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998); *Chuono Van Pham v. Citv of Seattle, Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). "The burden of demonstrating that a fee is reasonable is upon the fee applicant." *Berrvman*, Id. at 657. The record is insufficient here to support the fee award.

The fee award is also improper and premature as a matter of law. In this case, the Court awarded fees to Respondent on two grounds – CR 11 and RCW 7.28.083.

A CR 11 sanction is only appropriate if Plaintiff filed a pleading that is: (1) not well-grounded in fact; (2) not warranted by existing law or by a good faith argument for extension or modification of existing law; or (3) interposed for an improper purpose. CR 11(a). The burden is on the moving party to justify the request for sanctions. *Biggs v. Vail*, 124 Wn.2d 193, 202, 867 P.2d 448 (1994); *Eugster v. City of Spokane*, 110 Wn.

App. 212, 232, 39 P.3d 360 (2002); *Brin v. Stutzman*, 89 Wn. App. 809, 827, 951 P.2d 291 (1998).

> The purposes of sanctions are to deter, to punish, to compensate and to educate. Where compensation to litigants is appropriate, then sanctions should include a compensation award. However, we caution that the sanctions rules are not "fee shifting" rules. Furthermore, requests for sanctions should not turn into satellite litigation or become a "cottage industry" for lawyers.

Wash. Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn. 2d 299, 356, 858 P.2d 1054 (1993).

CR 11 provides in relevant part:

> The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation....

"The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system." *Bryant v. Joseph Tree, Inc.*,

119 Wn.2d 210, 219, 829 P.2d 1099 (1992). CR 11 "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." *Bryant, Id*., at 219.

> Complaints which are 'grounded in fact' and 'warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law' are not 'baseless' claims, and are therefore not the proper subject of CR 11 sanctions.

Bryant, supra, at 219-20.

CR 11 sanctions are not appropriate merely because the factual basis of an action is ultimately found wanting or because a legal theory reasonably asserted in good faith ultimately proves incorrect. *Roeber v. Dowty Aerospace Yakima*, 116 Wn. App. 127 at 142, 64 P.3d 691 (2003). Similarly, sanctions are not appropriate merely because a trier of fact resolves a credibility dispute in favor of one party and against the other. *Saldivar v. Momah*, 145 Wn. App. 365 at 405, 186 P.3d 117 (2008).

Thus, imposition of CR 11 sanctions is "not a judgment on the merits of the action," but rather "the determination of a collateral issue: whether the attorney [or party] has abused the judicial

process." *Biggs v. Vail,* 124 Wn.2d, 193 at 198, 876 P.2d 448 (1994) (quoting *Cooter & Gell v. Hartmax Corp*., 496 U.S. 384, 396, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)). If the issues in the case are debatable and subject to rational legal and factual argument, the case is not frivolous. *Bill of Rights Legal Found. v. Evergreen State Coll.*, 44 Wn. App. 690 at 696-97, 723 P.2d 483 (1986) (analysis under RCW 4.84.185, but the standard for frivolity under that statute and CR 11 mirror each other (*Harrington v. Pailthorp*, 67 Wn. App. 901 at 911-13, 841 P.2d 1258 (1992).

Here, nothing in the Complaint or the rest of the case indicates that Plaintiff or Plaintiff's counsel have abused the judicial process or outstretched a good faith argument for the application or extension of existing law. On the contrary, there is a strong case for adverse possession, which should have proceeded to trial, and a triable case for prescriptive easement rights as well. These claims were both grounded in fact and warranted by law.

> Complaints which are 'grounded in fact' and 'warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law' are not 'baseless' claims, and are therefore not the proper subject of CR 11 sanctions.

Bryant, supra, at 219-20.

5.9 Request for Attorney's Fees or Reservation Thereof

In this case, the court also awarded fees under RCW 7.28.083, which provides, in part:

> The prevailing party in an action asserting title to real property by adverse possession may request the court to award costs and reasonable attorneys' fees. The court may award all or a portion of costs and reasonable attorneys' fees to the prevailing party if, after considering all the facts, the court determines such an award is equitable and just.

Unlike the CR 11 award, the award of fees to the party that prevails on an adverse possession claim would be legally supported in this case. However, it is premature. Appellant has a triable, even a strong, case for adverse possession and was erroneously denied a trial on the merits on that claim. This Court should reverse the summary judgments issued by the Trial Court and remand this case for trial on Appellant's claims. The prevailing party at trial should be awarded fees under RCW

7.28.083(3), but only after prevailing at trial and then only to the extent the fees were incurred pursuing or defending against the adverse possession claim. Insofar as a reservation of this fee claim is necessary under RAP 18.1, Appellant so reserves it, including fees incurred on appeal.

6. Conclusion

In this case, the Superior Court weighed evidence on summary judgment, leading to the judge disregarding sufficient evidence submitted by the non-moving party that presented a triable case for both adverse possession and prescriptive easement and a triable defense against the counterclaims made by the Respondents, including a claim for expansion of an easement of record. Such weighing of evidence is inappropriate on summary judgment. Rather, if there is any weight to the evidence submitted by the non-moving party, the case must proceed to trial even if the moving party presented, in volume at least, far more evidence in the summary judgment process. This Court should reverse the rulings on summary judgment and remand this case for trial on both the Appellant's claims for

prescriptive easement and adverse possession and on Appellant's defense against Respondent's claim to reform and expand their easement of record.

The Superior Court also substantially erred when it imposed additional restrictions on Appellant's use and occupancy of her own property beyond any restriction in the title record. There is no justification in law or equity for an order preventing a landowner from reasonably using and occupying her own property because a neighbor might be inconvenienced thereby if they trespass. However, that is what the Superior Court ordered.

Finally, the Superior Court inappropriately awarded fees under CR 11 and RCW 7.28.083. This Court should reverse that ruling as well. The CR 11 award is inappropriate as Appellant has a non-frivolous, triable case on the facts here. Further, prior to trial, any award of fees under RCW 7.28.083 is premature.

This Court should reverse all summary judgment and preliminary orders issued by the Superior Court remand this case for trial.

Pursuant to RAP 18.17(b), I certify that the text of this brief, not including appendices, signature, or certificate of service, contains 7,369 words, and does not exceed the maximum of 12,000 words for Appellate Briefs as required under RAP 18.17(c)(2).

DATED this 2nd day of August, 2022.

DESCHUTES LAW GROUP, PLLC

_____
Ben D. Cushman, WSBA #26358
Attorney for Appellant Wohlleben

CERTIFICATE OF SERVICE

I certify that on the date signed below, I caused the foregoing document to be e-filed with this Court, and e-served upon the Parties through their attorneys of record by email.

DECLARED UNDER PENALTY OF PERJURY ACCORDING TO THE LAWS OF THE STATE OF WASHINGTON.

Dated this 2nd day of August, 2022, in Olympia, WA.

/s/ Doreen Milward
Doreen Milward

E-SERVED:

Attorney for Defendants
WSBA #18814
J. Vander Stoep
Vander Stoep, Remund, Blinks & Jones
345 N. Pacific Avenue
PO Box 867
Chehalis, WA 98532
jv@vanderstoep.com
allen@vanderstoep.com

DESCHUTES LAW GROUP, PLLC

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